

CALIFORNIA COASTAL COMMISSION

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Staff: TH-LB
Staff Report: December 20, 1999
Hearing Date: January 11-14, 2000
Commission Action:

STAFF REPORT: APPEAL
DE NOVO COASTAL DEVELOPMENT PERMIT

LOCAL GOVERNMENT: County of Orange

LOCAL DECISION: Approval with Conditions

APPEAL NUMBER: A5-IRC-99-301

APPLICANT: Irvine Community Development Company

AGENTS: M. Andriette Adams, Culbertson and Adams

PROJECT LOCATION: Southern Coastal Orange County, North of PCH, West of Crystal Cove State Park and East of the City of Newport Beach, Irvine Coast (Newport Coast), Orange County

PROJECT DESCRIPTION: Seventh Amendment to the Master Coastal Development Permit for the Newport Coast Planned Community (NCPC). Proposed development includes mass grading, backbone infrastructure for future development and approval of Vesting Tentative Tract Map 15447 in Planning Areas (PA) 4A, 4B, 5, 6, 12C, 12E and 12G. Water quality treatment program including PA 3A, 3B, 12A, 12E, and areas west of Los Trancos Canyon, and grading and drainage improvements within Crystal Cove State Park (PA 17) are also proposed.

APPELLANTS: Coastal Commissioners Sara Wan

SUMMARY OF STAFF RECOMMENDATION

At a public hearing on October 12, 1999 the Commission determined that **a substantial issue existed** with respect to the local government's approval of the proposed development on the grounds that the approval did not conform to the Newport Coast (formerly Irvine Coast) certified Local Coastal Program (LCP).

Staff recommends that the Commission, after a public hearing, **deny** the proposed project on the grounds that it is inconsistent with the environmentally sensitive habitat area (ESHA), Erosion, Sediment, and Runoff policies of the certified LCP.

SUBSTANTIVE FILE DOCUMENTS:

1. Irvine Coast (Newport Coast) Certified Local Coastal Program.
2. Local Coastal Development Permit Record No. PA 97-0152).
3. Master Drainage and Water Quality Enhancement Program, NCPD, revised December 10, 1999
4. Southern Coastal Needlegrass Grassland Restoration Plan, Crystal Cove/Newport Coast Phases IV-3 and IV-4, revised December 14, 1999.
5. Wetland/Riparian Mitigation Plan, Crystal Cove/Newport Coast Phases IV-3 and IV-4, revised December 14, 1999.
6. Substantial Issue staff report and Commission findings, A5-IRC-99-301(Irvine Community Development Company), 9/2/99
7. California Department of Fish and Game, 1603 Agreement No. 5-212-99, Irvine Community Development Company
8. California Water Resources Control Board, Waiver of Waste Discharge Requirements and Water Quality Certification for the proposed Crystal Cove/Newport Coast Phases IV-3 & IV-4 Project, (ACOE Reference No. 980071600-YJC), September 30, 1999

EXECUTIVE SUMMARY

1. Background

At its October, 1999 meeting, the Commission found that the appeal of County of Orange coastal permit 97-0152 by Commissioners Nava and Wan raised a Substantial Issue on the grounds of the development's inconsistency with the LCP provisions regarding environmentally sensitive habitat areas (ESHA), that the permit approved development outside of the LCP area, specifically within Crystal Cove State Park, and that the permit unilaterally deleted the Commission's appeal jurisdiction with regards to development adjacent to streams. Subsequent to the Commission's finding of Substantial Issue on the appeal the applicant revised the permit application for this de novo stage of the appeal. Among other modifications, the de novo application proposes a water quality enhancement program and deletes the request to amend the appeal jurisdiction of the Commission, has sought and obtained permission from the Department of Parks and Recreation for development within the applicant's retained easement in Crystal Cove State Park and for low flow runoff diversion structures outside of the retained easement within the Park.

The action currently before the Commission is the de novo portion of the appeal. The Commission's finding of Substantial Issue invalidated the locally issued coastal permit. Pursuant to section 30604(b) of the Coastal Act, the Commission's standard of review for the proposed development is the certified Local Coastal Program. Staff is recommending that the Commission deny the coastal development permit application for the reasons set forth below. Because the proposed project also involves the fill of wetlands and other non-wetland jurisdictional waters of the United States, the applicant must obtain a 404 permit from the Army Corps of Engineers. The 404 permit can not be granted unless the applicant first obtains a federal consistency certification or waiver from the Commission. If the Commission were to approve this coastal development permit, it would also serve as the federal consistency certification.

2. Proposed Project

The proposed project involves approximately 980 acres of undeveloped moderate to steeply sloping hillsides, canyons, and ridges (referred to as Planning Areas (PA) 4A, 4B, 5, 6 and 12C) and includes large lot subdivision and approval of Vesting Tentative Tract Map 15447, mass grading involving approximately 22,000,000 cubic yards (cy) of cut, 25,000,000 cy of fill and 13,000,000 cy of additional remedial grading for future residential (635 homes) and recreation development (32 acres), 298.5 acres of dedicated open space lands (PA 12 E and 12 G) and the construction of backbone infrastructure (drainage facilities, utilities, roads, etc) (Exhibit 1). Because the Newport Coast LCP does not specify a single "principal permitted use", all subsequent coastal permits issued by the County of Orange such as project level subdivisions, grading and construction of homes, will be appealable to the Coastal Commission pursuant to Section 30603(a)(4) of the Coastal Act.

The applicant is also proposing what they consider a "state of the art" water quality enhancement program including frequent vacuum street sweeping; the installation of debris and contaminant filters in selected catch basins and storm drain outlets emptying into the creek; diversion of dry weather runoff to the sewage treatment plant; and the construction of wetland/riparian mitigation areas which serve the dual purpose of mitigation for the loss of wetlands and other non-wetlands waters required by the Army Corps of Engineers (ACOE) for a 404 permit approval and filtering runoff as a component of the water quality program.

Both proposed development areas and areas outside of the subject permit area will be subject to the water quality treatment program. The dry weather diversion program will include portions of the existing developed area west of Los Trancos Canyon picking up runoff from a portion of the existing golf course

and residential and overnight lodging accommodations. The water quality program, while substantial, does not on balance provide enough benefits to the on- and off-site ESHAs to outweigh the components of the project that are inconsistent with the policies of the LCP that protect the natural streams and beach from destabilization, accelerated erosion and loss of beach material and the potential adverse impacts to public beach access and recreation.

3. Staff Recommendation

Staff is recommending that the Commission **deny** the proposed project due to the project's inconsistency with the ESHA policies of the certified Newport Coast (formerly Irvine Coast) LCP which dictates that all development be setback 50 feet from Blueline streams that are designated ESHA Category "A" and "B", unless specifically excepted. The proposed Muddy Canyon detention basin is located within a Category "A" and "B" ESHA and would result in the loss of 0.12 acres of riparian wetlands. The detention basin location is further inconsistent with the Backbone Drainage Plan of the LCP which locates all detention basins out of the major streams and locate them either within the development areas or on tributary drainages.

The Erosion, Sediment, Runoff and Grading Policies of the LCP further protect the ESHA designated streams and the off-shore Category "C" ESHA which is designated both a Marine Life Refuge and an Area of Special Biological Significance. These policies require that peak runoff rates in the major streams not exceed the natural peak rate unless it can be demonstrated that an increase in the discharge rate by no more than 10% will not significantly affect the natural erosion/beach sand replenishment process. The proposed project would significantly increase the rate of runoff over natural conditions and is kept an 8.5% increase only by placing a detention basin within the ESHA designated Muddy Canyon stream, inconsistent with the LCP.

The project would also significantly reduce the amount of sediment discharge in the project area, as much as 80% and 97% reduction in some stretches of the beach, inconsistent with the Runoff Policies of the LCP. The applicant contends that this loss of sediment is not significant. Finally, the proposed project may cause downstream sections of Muddy Creek to become unstable due to the placement of the proposed detention basin within the stream. The applicant has not demonstrated that the proposed detention basin is sited in the least environmentally damaging location and that there are no other feasible locations, through possible redesign of the subdivision, outside of the drainage course. Therefore the project is inconsistent with the ESHA policies of the LCP.

STAFF RECOMMENDATION:

MOTION: ***I move that the Commission approve Coastal Development Permit No. A5-IRC-99-301 for the development proposed by the applicant.***

STAFF RECOMMENDATION OF DENIAL:

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO DENY THE PERMIT:

The Commission hereby denies a coastal development permit for the proposed development on the ground that the development will not conform to the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

IV. Findings and Declarations

The Commission hereby finds and declares:

A. Project Description

As originally approved by the County of Orange coastal permit PA97-0152 included minor boundary adjustments between the planning areas, mass grading, and backbone infrastructure (drainage facilities, utilities, roads, etc.) for future residential, private recreation and public and private open space uses in Planning Areas (PA) 4A, 4B, 5, 6, 12C, 12 E and 12G. The development is also known as Phase IV-3 and IV-4 of the Newport Coast Planned Community (NCPC). (See Exhibit 1). The existing 3,800 ft. long fire access dirt road which goes through previously dedicated open space area (PA 12 A) connecting PA 4A to PA 5 was approved by the County to be widened from 12 ft. to 26 ft. Widening of the road and residential development in PA 5 would have eliminated 0.4 acres of unique Purple Needlegrass, an important remnant of native grasslands.

The County permit also approved grading in Crystal Cove State Park within the Irvine Company's retained easements. The easements allow remedial grading and roads within 150 feet of the

common boundary. Approximately 250 feet of the private access road for the recreation center in PA 12C also located with Crystal Cove State Park.

Subsequent to the Commission's 10/12/99 finding of Substantial Issue on the appeal of the locally approved permit the applicant revised the project description. On October 27, 1999 the applicant modified the project to delete the modification to the appeal jurisdiction of the Coastal Commission as adopted in the LCP and also development within Crystal Cove State Park as a component of the County's authorization since the County does not have the authority to approve development within the State Park. The applicant is also now reducing the proposed width of the fire access road through PA 12 A from 26 ft. to 14 ft. in the area where a remnant of native Purple Needlegrass grassland is located. Although no Needlegrass will be eliminated due to the widening of the road residential development in PA 5 will remove 0.4 acres of the native grassland. The application includes the mitigation of this loss of Purple Needlegrass at a ratio of 4:1 for a total of 1.6 acres of Needlegrass that will be planted in dedicated open space area PA 12 E. (See Exhibit 2). The applicant is also proposing to construct three seasonal wetlands totaling 0.40 acres at the top of a knoll also in conservation area PA 12E. The wetlands would mimic the three existing seasonal wetlands, at a 4:1 ratio, located in PA 4A which will be filled under the residential development proposal (See Exhibit 3). The wetlands are being proposed for wetlands mitigation for the ACOE 404 permit although the applicant contends that the existing "agricultural" wetlands are excluded from the definition of wetlands as defined by section 13577 of the Commission's regulations.

The applicant has also now obtained permission from the Department of Parks and Recreation to apply to the Coastal Commission for development within Crystal Cove State Park, including the construction of approximately a 250 ft. segment of the access road to serve PA 12C, remedial grading, and the construction of a portion of the proposed Muddy Canyon detention basin, spillway and energy dissipator the park boundary (See Exhibit 4).

The applicant's revised project description also includes the implementation of a water quality improvement program as more fully described later in this report. According to the applicant the water quality enhancement program was already partially developed at the time of the appeal and has been expanded and enhanced as a result of discussions with interested agencies, including Coastal Commission water quality staff. While the Irvine Company is proposing the water quality treatment program, they also state that the certified Newport Coast LCP does not include any water quality policies and that the Commission may lack any legal ability to impose a comprehensive mitigation program for water quality. The Commission strongly disagrees with this statement as discussed in the water quality treatment program section of this report.

The applicant describes water quality treatment proposal as a comprehensive, state of the art program to treat urban runoff. Specific measures include intercepting dry season or "nuisance" flows in existing developed areas outside of the project area, as well as the project area and diverting them to the Orange County Sanitation District sewage treatment plant; frequent vacuum street sweeping including areas outside of the permit area as well as the area covered by this permit; the installation of storm drain filters in all major outflow points into Muddy and Los

Trancos canyons and in selected catch basins in the residential areas of the project and the commercial and residential area adjacent to PCH outside of this permit area (PA 3A, 3B and 14); construction of a detention basin in PA 12C; xeriscape landscaping and irrigation controls; the use of extensive open space areas in the periphery of the development areas; and community education on the importance of protecting storm waters from avoidable pollutants.(see Exhibit 5). The water quality program also includes the installation of wetland/riparian mitigation areas within Muddy Creek to serve the dual purpose of mitigation for ACOE 404 permit requirements and to filter urban runoff (see Exhibit 3).

The approval of Vesting Tentative Tract Map (VTTM) 15447 is also proposed. VTTM 15447 approves the subdivision of the area into large parcels for financing and/or sale or lease to builders (or in the case of the Conservation areas 12E and 12G, dedication to a public agency) to be further subdivided to ultimately build 635 detached single family homes on 581.5 gross acres (PA 4A, 4B, 5 and 6); the construction of a 32 acre private recreation facility on the 100 acre PA 12C site; and dedication as Conservation open space of 298.5 acres (PA 12E and 12G). The residential development closest to Pacific Coast Highway (PA 4A and 4B) is Medium density (3.5 to 6.5 du/a), in the upper area (PA 5) Medium Low density (2 to 3.5 du/a) and Low density (up to 2du/a) in PA 6. (Exhibit 1).

The application also includes the balanced mass grading of the planning areas totaling 22,000,000 cubic yards(c. y.) of cut, 24,720,000 c. y. fill, 480,000 c.y. export and 3,200,000 c.y. import. The excess material will be exported to PA 3B which is currently being graded under County issued coastal permits. Off-site grading will also occur in private open space area PA 12 B in order to create residential pads in PA 4B. Fill material will be imported PA 2C located west of PA 5, outside the project area.

An additional 13,150,000 c.y. of grading is necessary for remedial earthwork. The above grading also includes 100,000 c.y. of cut and fill and 250,000 c.y. of remedial grading for the widening and stabilization of the existing 3,800 ft. long unpaved fire access road which connects the Phase IV-3 and IV-4 portions of the project. The 12 ft wide fire access road will be widen to 26 ft. except where it is adjacent to Purple Needlegrass where it will only be widened to 14 ft. to avoid impacts to the remnant native grassland. _ (Exhibit 2).

Grading operations will create residential pads in PA 4A , 4B, one super pad in PA 12C for recreational facilities, and super pads in PA 5 and 6 for future pad grading of home sites. The design of the residential areas as described in the amendment to the master permit is, "a series of custom lot enclaves and future private access roads on terraces separated by slopes from 20 to 50 feet high to follow the rising elevation of the site." This project design entails cut slopes as deep as 135 feet and fill slopes up to 205 feet in height. One fill slope which faces down into Muddy Canyon will be approximately 350 feet in height. Exhibits 6 – 9 illustrate the grading concept.

B. LCP Area Description

The Newport Coast (formerly Irvine Coast) Local Coastal Program area is comprised of 9,493 acres in southwestern unincorporated Orange County (Exhibit 10). If the land that is now part of Crystal Cove State Park (which has its own certified Public Works Plan) is also considered the Newport Coast area would extend from the 3 and one-half mile long shoreline of the Pacific Ocean to the ridge of the San Joaquin Hills and the San Joaquin Hills Transportation Corridor. The LCP area is characterized by moderate to steep hillside terrain, canyons and ridgelines (See Exhibit 1). The shoreline is characterized by a series of sandy cove beaches interspersed with rocky and headlands areas. On the inland side of PCH the gentler sloping Pelican Hill and Wishbone Hill areas are in the northwestern portion of the LCP area. These ridges and hillsides contain three major canyons, Buck Gully, Los Trancos and Muddy Canyon. On the eastern end of the LCP area are Moro Canyon and Emerald Canyon (Exhibit 11). Extensive coastal sage scrub covers most of the area and portions of the LCP area are within the Central and Coastal Subregion Natural Communities Conservation Program (NCCP)/Habitat Conservation Plan (HCP).

The 3.5 miles of the Newport Coast shoreline is designated a Marine Life Refuge by the Department of Fish and Game. It is the largest marine life refuge in California – approximately 20,000 ft. in length and 600 ft. wide (600 ft. seaward of the “line of ordinary high tide”). The California State Water Resources Control Board also designates the coastal waters an Area of Special Biological Significance (ASBS). In 1972 the area was also listed as a potential educational reserve in the California Comprehensive Ocean Area Plan. The LCP designated the off-shore coastal waters ESHA Category “C” and contains policies to protect the biological integrity of this marine resource. The Marine Life Refuge/Area of Significant Biological Significance is characterized by jagged, rocky reefs and pinnacles extending from the intertidal zone to depths of 40 to 50 feet. Rocky outcroppings also occur at depths of 60 to 600 feet. The flora and fauna of these areas are highly diversified, particularly the rocky intertidal areas and the offshore kelp community.

Portions of the inland slopes were extensively used for cattle grazing. During that time the natural brush was often cleared and herbicides were used to artificially expand the grassland for grazing purposes and to prevent the encroachment of the natural coastal sage scrub and other native brush into the “pasture” areas. The coastal bluffs were also farmed for a number of years. Despite the changes to the vegetation that occurred during the period of grazing and farming the LCP area still contains vast areas of natural habitats and support a diversity of wildlife species. The number and diversity of species are enhanced by the presence of ecotones created by the variation in habitats, the small area covered by many of the habitat stands, and the mix of stands.

The land uses of the 9,493 LCP area (including the 2,807 acre Crystal Cove State Park which is covered by a separate Public Works Plan and not a part of this LCP) include 277 acres designated tourist commercial; 1,873 acres designated low, medium-low, medium and high density residential land use; and 7,343 acres of open space (public and private parks, recreation and conservation) land use. Included within the open space designation is 455 acres of golf course use (two 18 hole courses), private passive and active parks, publicly dedicated passive

recreation open space areas and Crystal Cove State Park. The LCP allows a maximum of 2,600 residential units, 2,150 resort/overnight accommodations and 2.66 million square feet of commercial development.

C. LCP BALANCING PROVISIONS

The Commission's standard of review for the proposed development is the certified Newport Coast (formerly Irvine Coast) LCP. The Newport Coast LCP is one of the seven segments of the Orange County Local Coastal Program. The certified LCP is comprised of the certified Land Use Plan (LUP) and the certified implementing ordinances or implementing actions program (IAP). The Irvine Coast LUP was certified by the Commission on January 19, 1982. The Implementing Actions Program along with the first amendment to the LUP was certified on January 14, 1988. In 1996 the Commission certified a second amendment to the Irvine Coast LCP and approved the change in the name of the LCP segment to Newport Coast.

As detailed below, the Commission relied on the balancing provisions of the Coastal Act in the certification of the Newport Coast LCP. Section 30007.5 of the Coastal Act provides the Commission with the ability to resolve conflicts between Coastal Act policies. This section provides that:

The Legislature finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner that on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

Land Use Plan

The 1982 certified LUP allowed development of up to 3,730 acres of the LCP area with a maximum of 2,000 residential units and visitor-serving commercial development including 2,000 hotel/motel units, restaurants, commercial recreational facilities, tourist-commercial shops and offices totaling 300,000 square feet. This development was allowed within designated Planning Areas that contained scenic natural landforms, natural Blueline streams and tributaries, and archaeological resources. Two arterial highways were designated through the Irvine Coast LCP area in a general north/south direction: Pelican Hills Road, a six lane major highway and Sand Canyon Avenue, proposed as a four lane primary arterial highway with a fifth passing lane.

In conditionally certifying the LUP in 1982 the Commission specifically found:

The underlying concept of the Irvine Coast LCP land use plan is a dedication of open space, to preserve it in its natural undisturbed state, mitigation for the impacts associated with residential and commercial development that would not otherwise be found to be consistent with the Coastal Act. The Commission finds that this approach is an appropriate way to maximize protection of environmentally sensitive areas, by concentrating development and preserving large contiguous areas of open space.

The Commission approved the LUP subject to conditions requiring that (1) the proposed Sand Canyon Avenue be limited to two lanes in order to minimize the significant adverse impacts including destruction of the bottom of Muddy Canyon, significant impacts to the wildlife corridors connecting Los Trancos Canyon with the proposed conservation areas, as well as visual impacts to park users; (2) the provision of policies to ensure that grading activities protect coastal views and natural resources; (3) environmentally sensitive areas policies to ensure that the resources are mapped using current information, that the rate of run-off in streams and gullies associated with development does not cause excessive siltation and impacts on the off-shore environment, protection of land resources through fuel modification practices and the protection of environmentally sensitive resources by requiring that the least environmentally damaging alternatives are employed in development projects; (4) and modification to the land dedication program including the timing of dedication, the development to dedication ratio and phasing and requiring the landowner, the Irvine Company to enter into a Development Agreement with the County of Orange to assure the implementation of the approved dedication program.

As mitigation for the impacts of that development, 2,650 acres of undisturbed land in the southeasterly portion of the LCP area was to be dedicated to the public for environmentally sensitive habitat preservation, archaeological resource protection, visual resources protection and the provision of public access trails and low intensity public recreation use (Exhibit 12). Although the land dedication was to mitigate the impacts of development on the natural and cultural resources of the area, the LCP also contains policies to minimize the impacts of development by means such as site selection and grading controls to reduce erosion and siltation of off-shore waters; development edge controls, buffers and setbacks to reduce impacts on habitat and wildlife in conservation areas; retention of Los Trancos Canyon and Buck Gully as (private) open space allowing only minimal development to preserve the significant scenic and habitat resources within the development area while providing for on-site recreation opportunities for the new residents of the LCP area; and other

policies to preserve significant riparian vegetation, archaeological and paleontological resources and reduce visual impacts of residential development.

In addition to the 2,650 acre open space dedication, the LCP area also includes the following additional open space area:

- 1,900 acre purchase of land by the Department of Parks and Recreation creating Crystal Cove State Park, and an additional 500 acre gift (Moro Ridge) from the Irvine Company for the state park;
- the right of the State to purchase an additional 393 acres of park land;
- 931 acres of the proposed Orange Coast National Urban Park;
- 570 acres of private recreation areas within the development Planning Areas.

The public lands dedication and purchase combined with the private open space areas resulted in 60% to 74% of the LCP area being devoted to open space use.

LCP First Amendment

In 1988 the Commission approved the first amendment to the Irvine Coast LUP and certified the Implementing Actions Program to carry out the amended LUP. The amended LUP proposed substantial changes to the residential, visitor-serving commercial and park/open space areas as well as the resource protection policies and the resource dedication program. The Commission approved the LUP amendment and IAP as submitted by the County of Orange. The highlights of the amended LUP were (1) deletion of permitted office use (200,000 sq. ft.); (2) expansion of hotel and visitor-commercial use near the intersection of Pelican Hill Road (now Newport Coast Drive) and PCH to include two 18-hole golf courses encompassing 367 acres, 400 additional hotel rooms (total 1,900) and 25,000 sq. ft. of additional commercial retail use (75,000 sq. ft. total); (3) clustering of 2,600 market rate residential units on the ridges; (4) preservation of open space in Buck Gully, Los Trancos Canyon, the frontal slopes of Pelican Hill, Muddy Canyon and 2,666 acres of land between the recently established 2,807 acre Crystal Cove State Park and the City of Laguna Beach.

Although the amended LUP allowed an increase in the number of residential units, from 2,000 to 2,600, the actual amount of land area devoted to residential use was reduced from 38% to 23%. The total percentage of the LCP area devoted to open space use was increased from 61% to 74%, not

including the two golf courses. The Commission found that the policies proposed to protect the marine environment in conjunction with golf course use were consistent with Section 30231 of the Coastal Act. Those provisions included the creation of a riparian corridor within the Category "D" ESHA (similar to what is being proposed in PA 5 in the subject permit), control of fertilizer, pesticide and herbicide use, and the preparation of a water quality monitoring program with regular reporting to the Regional Water Quality Control Board and the County of Orange. With respect to grading and urban runoff control policies, the amended LUP also required the preparation of a Master Drainage and Urban Runoff Management Plan to assess the cumulative impacts of development as well as reducing the land area devoted to low priority residential use.

The Commission's 1988 findings approving the amended LUP as submitted referred to "the findings adopted by the California Coastal Commission in approving the 1982 LUP contain a detailed analysis of Coastal Act consistency regarding the manner in which the open space dedication area mitigates the development impacts of 1982 land uses" and incorporated the previous findings. Additionally, the Commission found:

Among the primary goals of the Coastal Act are the protection of coastal resources and provision of public access to the coast. The Legislature, also recognized that conflicts might occur when carrying out all of the Act's policies. The legislature, therefore, established a "balancing" test. This test allows the Commission to approve a plan which, although it may cause some damage to an individual resource, on balance is more protective of the environment as a whole (Coastal Action Section 30007.5) Public acquisition of large, continuous open space areas, as specifically determined in the findings of approval for the 1982 LUP, is recognized as a superior means to guarantee mitigation of development impacts through the preservation of coastal resources such as vegetation, wildlife, and natural landforms, and to create new public access and recreation opportunities rather than preserving small pockets of open space surrounded by development.

The 1988 LCP findings went on to explain how the LCP balances Coastal Act required resource protection and public access and recreation against individual impacts to ESHAs. The Commission found that the LUP carries out Section 30240(a) of the Coastal Act through the preservation in its natural state 2,666 acre open space area containing major canyon watersheds, visually significant ridgelines, stream courses with riparian vegetation (Category "A" and "B" ESHAs) archaeological and paleontological sites, coastal chaparral and other wildlife habitats. Additionally, 1,155 acres of habitat areas in Los Trancos Canyon, Buck Gully and Muddy Canyon would be conveyed into public

management under the amended LUP in contrast to the 1982 LUP where these special use parks were under private ownership. Finally, consistency with 30240(a) was further achieved with the realignment of Sand Canyon Avenue to require that it be relocated out of Muddy Canyon and located up onto Wishbone Ridge in the LUP amendment along with the dedication of the canyon to the County. The Commission further found that the 2,666 dedicated open space area would be contiguous with the 2,807 Crystal Cove State Park to allow better management of the 5,473 acres of public recreational use.

The Commission also found that the amended LCP was consistent with Section 30240(b) of the Coastal Act that requires that development adjacent to ESHA areas not adversely impact the ESHA resources. The LCP policies that carried this out were the strengthening of the policies regarding protection of Category "A" and "B" ESHAs by limiting allowable development, fuel modification and development edge policies, the comprehensive Master Drainage and Runoff Management Plan that would be required to be approved before the first coastal development permit draining into Buck Gully, Los Trancos or Muddy Canyon could be approved, that the 2,666 acre open space area be designed as wilderness park land use as opposed to a more intensive recreational use so that the natural resources of the area are preserved.

The Commission found that the above method of habitat protection was more protective of the environmentally sensitive resources of the entire LCP area than would be afforded by the protection of individual ESHA designated streams and associated riparian vegetation if they were surrounded by residential and commercial development.

LCP Second Amendment

In October, 1996 the Commission approved the second amendment to the LCP which included a change in the name of the LCP segment to Newport Coast. The second amendment also proposed additional changes affecting environmentally sensitive habitat areas. According to the County, the main purpose of the second LCP amendment was to modify the LCP to include agreements that had been made between the County of Orange, the Irvine Company as landowner, the Department of Fish and Game and the U.S. Fish and Wildlife Service through the Central and Coastal Subregional NCCP (Natural Communities Conservation Plan) HCP (Habitat Conservation Plan). As a result of the NCCP and other considerations, the LCP amendment proposed changes to further reduce development impacts on environmentally sensitive habitat areas by providing a physical connection of the open space being preserved under the certified LUP in Buck Gully and Los Trancos Canyons with

the open space land being preserved in Muddy Canyon, Crystal Cove State Park and the wilderness dedication areas.

To accomplish the habitat improvements Sand Canyon Avenue was deleted from the LCP. Under the approved LCP Sand Canyon Avenue would have been built along the ridgeline separating Los Trancos Canyon and Muddy Canyon and would have resulted in significant landform alteration and the loss of 150 acres of natural open space (including coastal sage scrub) and interfered with a prime wildlife crossing corridor in the upper area of the coastal zone. (Exhibits 13 and 14). The residential development that flanked the Sand Canyon Avenue on both sides was also eliminated. Residential Planning Areas PA 4A, and 4B were pulled back to concentrate development adjacent to the residential development proposed along the landward side of PCH. PA 5 and 6 were also pulled back toward San Joaquin Hills Road and reconfigured in the upper portion of the LCP area thereby leaving a natural open space corridor connection between PA 4A and 4B and PA 5 and 6 connecting Los Trancos and Muddy Canyon (see Exhibit 14). PA 6 was decreased in size by 115 acres and the land area was changed from residential to conservation land use to accommodate the wildlife connection corridor. This reconfiguration of PA 5 and 6 also resulted in Muddy Creek being relocated to PA 5 instead of PA 6 which a comparison of Exhibits 13 and 14 reveals.

The Commission approved an increase in the residential density of PA 4A and 4B from low to medium density in order to facilitate the concentration of residential development adjacent to and along PCH. However, the total number of residential units was not increased from 2,600 units. The Second LCP Amendment findings again reference the Commission's certification of the LCP based on concentrating development adjacent to existing road and the conservation of large expanses of continuous open space areas in exchange for allowing impacts to individual ESHA in designated development areas.

D. ENVIRONMENTALLY SENSITIVE HABITAT AREAS

The preceding discussion details the Commission's allowance of the elimination or significant modification to some ESHA resources in the certification of the LCP in exchange for the public open space dedication and public access provisions of large tracts of undeveloped areas for habitat, scenic and cultural resource protection, most of it with ESHA Category "A" and "B", higher quality habitat (see Exhibit 25). Although the LCP allows the elimination or significant modification to the Category "D" ESHAs within development planning areas, ESHA resources within the development planning areas are still recognized and protected. Category "A", "B" and "C" ESHAs are protected. In Category "A" and "B" ESHAs only development that can not be located outside of the ESHAs

are allowed and only if the development is designed and sited to be the least environmentally damaging development alternative.

The Coastal Act and the certified Newport Coast (formerly Irvine Coast) LCP recognizes unique and sensitive land and marine resources and require that they be identified and protected. Streams and the associated riparian vegetation along their banks, wetlands, off-shore coastal waters, coastal sage scrub, and native grasslands, including Purple Needlegrass (*Nassella pulchra*) are examples of unique or sensitive resources. All of these resources are present within the project area or are impacted by the proposed development of project area. The LCP treats these resources differently as reflected in the resource protection policies.

1. Streams and Other Drainages

A total of approximately 37,000 linear feet or slightly more than seven miles of Blueline streams and other minor drainages will be filled under the current project proposal. Of this figure, 9,800 linear feet or roughly 1.86 miles are Blueline streams and the remaining 27,200 linear feet or 5 miles are minor drainages. All of the Blueline streams are designated Environmentally Sensitive Habitat Areas (ESHAs) in the LCP. However the minor drainages are not considered streams.

The minor drainages are designated “jurisdictional non-wetland waters of the U.S.” by the federal government. (See Exhibit 15). These drainages, typically two feet or less in width, are not considered streams by the Coastal Act and are therefore not mapped in the LCP or the post-certification maps certified by the Commission. The minor drainages are ephemeral or contain water only when it rains. When it rains the drainages rapidly convey water to Muddy Creek or other tributaries but at all other times they are dry due to their short length, steepness and narrowness. However, because they convey water to streams, which ultimately empty into navigational waters, they are “waters of the U.S.”

Although these drainages are not considered streams in the Coastal Act, according to June 4, 1999 letter of U.S. Fish and Wildlife Service (FWS), they possess important functions and values that are commensurate with, if not well in excess of, some of the portions of the drainages that are Blueline streams (Exhibit 16). Similar opinions were made in the June 4, 1999 letter of the U.S. Environmental Protection Agency (EPA) (Exhibit 16A). Both FWS and EPA were objecting to the ACOE issuance of a Nationwide Permit NW26 for the proposed project citing cumulative impacts to the 37,000 linear feet of streams and ephemeral drainages. On July 14, 1999 ACOE denied a NW26 permit without prejudice. However on August 18, 1999 the ACOE determined that the

application did qualify for a NW26 permit subject to certain special conditions including mitigation for the loss of wetlands and non-wetlands jurisdictional waters (Exhibit 16B). EPA however does not agree that the impacts of the proposed project are adequately mitigated through the proposed wetland/riparian mitigation and that the proposed development is the least environmentally damaging practicable alternative (Exhibit 16C).

The certified LUP defines ESHAs in Section I-3 Resource Conservation and Management Policies as follows: *“For purposes of Section 30107.5 of the Coastal Act, natural drainage courses designated . . . on the USGS 7-minute series map, Laguna Beach Quadrangle, . . . (hereafter referred to as “USGS Drainage Courses), coastal waters, wetlands, and estuaries are classified as “Environmentally Sensitive Habitat Areas” (ESHA’s).”* The natural drainage courses shown on the United States Geological Service (USGS) 7-minute series maps are commonly referred to as “Blueline streams” (Exhibit 15). The LCP further classifies these streams as ESHA Category “A”, “B”, or “D” and depicts them on Exhibit H (Exhibit 17). Category “C” is the coastal waters of the Pacific Ocean on seaward of Pacific Coast Highway which is designated both a Marine Life Refuge and an Area of Special Biological Significance (ASBS). The LCP classifies the USGS streams as Category A, B or D based on their habitat value. This classification was based on a biological inventory done at the time of the original Land Use Plan certification more than 18 years ago. The applicant has submitted a current biological assessment of the ESHA areas that are proposed to be filled. These areas still meet the LCP ESHA criteria and basically have not changed in habitat value (Exhibits 18 and 19). Although the LCP also defines wetlands as ESHA, the LCP ESHA Map, Exhibit H shows only the USGS streams and does not indicate the location of any existing wetlands at that time.

2. LCP Policies Allowing the Elimination or Modification of Certain ESHAs

As stated above, the LCP classifies the streams based on habitat. A current biological assessment of the streams and wetlands proposed to be filled indicate that they still possess the qualities that warranted the initial ESHA designation of the certified LCP (Exhibits 18 and 19). The LUP states that Category “A” USGS Drainage Courses contain the most significant habitat areas and are subject to the most protection and are thus located entirely within Planning Areas which have Recreation or Conservation land use designations. Although Category “B” ESHAs support less riparian vegetation than Category “A” streams and contain water only when it rains, the LCP also seeks to preserve these USGS Drainage Courses. Category “D” ESHAs are deeply eroded and are of little or no riparian habitat value. These drainages are

characteristically incised as a result of erosion, resulting in rapid runoff and steep narrow side slopes generally incapable of supporting vegetation. For this reason, the portions of streams that have a Category "D" ESHA designation are generally located within residential or other planning areas allowing them to be significantly modified or eliminated altogether.

The LCP allows modification or elimination of all the Category "D" ESHA drainage courses within the project site. All of the Planning Areas proposed for residential development, (PA) 4A, 4B, 5 and 6 contain some portion of a Category "D" ESHA (Exhibit 17). The applicable LCP policy is F. 2. which reads:

F. CATEGORY "D" ENVIRONMENTALLY SENSITIVE HABITAT AREA POLICIES

2. PA 1A, PA 1B, PA 1C, PA 2A, PA 2B, PA 2C, PA 3A, PA 3B, PA 4A, PA 6, PA 8, PA 9, PA 10A, PA 10B, PA 11A, PA 12A, PA 12B, PA 12D, PA 12E, PA 12F, PA 12G, PA 12H, PA 12I, PA 12J, PA 13A, PA 13B, PA 13C, PA 13D, PA 13E, PA 13F, PA 14, PA 16A, PA 20A, PA 20 B, AND PA 20C:
Vegetation and drainage courses will be modified or eliminated by development. The Open Space Dedication Programs and Riparian Habitat Creation Program will mitigate any habitat values lost as a result of such drainage course modification or elimination.

The Commission found in the Substantial Issue portion of this appeal that because PA 5 is not listed in the above LCP policy, which specifies in which Planning Areas Category "D" drainages can be filled, that the appeal raised Substantial Issue with regards to protection of ESHAs. However, the Commission finds that the fill of this ESHA is allowed pursuant to the originally certified LUP and the first amendment to the LUP. The Commission finds that the fact that PA 5 is not listed in the above policy is a typographical error. Exhibit 17 is a map of the ESHA designated streams and the Planning Areas as they were configured in the first LUP amendment. As the map indicates, the portion of Muddy Canyon stream that is currently in PA 5 was at that time located in PA 6. The above LCP policy allows the stream to be filled in PA 6. Under the second LUP amendment the Planning Area boundaries were reconfigured by the County. As shown in Exhibit 17 the same portion of Muddy Canyon stream that was allowed to be filled when it was in PA 6 is now located in PA 5. However, when the County revised the Planning Area boundaries it inadvertently neglected to revise the above policy F. 2 to include PA 5. There is no basis in the Commission's findings or the County's proposal that the Commission intended to prohibit the fill of the ESHA Category "D" stream once

it was reconfigured to be located within PA 5. Therefore the Commission finds that the fill of the ESHA Category “D” stream in PA 5 to be consistent with the certified Newport Coast LCP.

3. LCP Policies Limiting the Fill of Certain Streams and Riparian Areas

Although the certified LCP allows the elimination of some ESHAs and modifications to others, the LCP also requires that development approved within and adjacent to those ESHAs be sited and designed in a way to reduce impacts on the remaining ESHA resources and that the least environmentally damaging development alternative be chosen. The proposed Muddy Canyon detention basin is located within Category “A” and “B” ESHA in Planning Areas (PA) 12 C and PA 17. Category “A” and “B” ESHAs are natural Blueline streams containing riparian wetlands. The proposed detention basin is inconsistent with ESHA Policy D. 1. It has not been demonstrated to be sited in the least environmentally damaging and feasible location. The applicant has also not demonstrated that the basin or a combination of detention basins, or other methods of preventing excessive runoff, can not be sited outside of the stream so that Category “A” and “B” ESHA are protected as required by the LCP policies. Policy D. 1. reads:

D. CATEGORY “A” & “B” ENVIRONMENTALLY SENSITIVE HABITAT AREA POLICIES

The following policies apply to Category A and B ESHA’s only, as delineated on Exhibit H.

1. Except for the ESHA B located in Planning Area 4A, the natural drainage courses and natural springs will be preserved in their existing state. All development permitted in Category A and B ESHA’s shall be set back a minimum of 50 feet from the edge of the riparian habitat except as provided for in the following subsections. If compliance with the setback standards precludes proposed development which is found to be sited in the least environmentally damaging and feasible location, then the setback distance may be reduced accordingly.
 - b. Where drainage and erosion control and related facilities are needed for new development and/or to protect the drainage course, the drainage course

may be modified to allow construction of such facilities. Modification shall be limited to the least physical alteration required to construct and maintain such facilities, and shall be undertaken, to the extent feasible, in areas involving the least adverse impact to the drainage course. Where feasible, drainage and erosion control and related facilities will be located outside the drainage course.

- g. Where drainage and erosion control and related facilities are needed to implement the master Drainage and Runoff Management Plan and related programs, vegetation may be removed in the construction and maintenance of such facilities. Vegetation removal will be limited to the least required to construct and maintain such facilities and shall be undertaken, the extent feasible, in areas involving the least adverse impact to riparian vegetation.

The applicant submitted an alternative analysis for other detention basin locations that looked at a total of 8 different sites (Exhibit 20). The alternatives analysis dismissed all of the sites except for the Muddy Canyon site due to (1) inadequate size given the runoff diversion that had already taken place in PA 3A, 3B and 14 in order to redirect runoff from this residential and commercial development away from the PCH culverts that discharge on the coastal bluffs above the beach; (2) greater impacts to existing coastal sage scrub or wetlands; or (3) access constraints. It was unclear as to whether the alternative locations considered were located on the major stream, a tributary or off-stream location.

Staff requested that the applicant conduct another alternatives analysis specifically looking for sites other than a location on Muddy Creek with a Category "A" or "B" ESHA designation, outside of the major stream altogether, and sites within the development area. The applicant submitted an analysis including six additional sites that were reviewed by their geotechnical and biological consultants (Exhibits 26A, 26B, and 26C and 26D). Four of the six locations were within proposed development areas. All four of these locations were rejected by the applicant's geotechnical consultants citing that there were all located either on top of proposed fill/stabilization fill slopes, proposed fill/cut slopes, proposed canyon fill area, or along a proposed daylight cut which is considered geotechnically unwise. These additional alternatives were all based upon the proposed grading scheme and therefore the Commission does not consider this an adequate alternative analysis. The applicant must consider

potential redesign of the subdivision and grading proposal in order to consider all feasible detention basin locations.

The two sites that are not located within the development areas are located where riparian enhancements are proposed for the water quality/wetland mitigation program. While these sites were considered suitable to receive runoff from the development of several hundred homes as well as runoff from natural areas, water from irrigated landscaping and the planting and maintenance of water dependent riparian vegetation, they are being rejected as suitable locations for detention basins. The Commission notes that these alternatives analyses have not been reviewed by Commission staff's civil engineer due to the lateness of the submittal.

For the reasons stated above, the Commission finds that the proposed development must be denied due to the fact that the applicant has not demonstrated that the detention basin can not be located in a manner consistent with the Category "A" and "B" ESHA policies of the certified LCP.

**3. LCP Policies Protecting the Stability of the Stream
and the Natural Beach Nourishment Process**

The LCP states that the Runoff Policies of the LCP were to carry out the water quality provisions required pursuant to the Coastal Act. Runoff policy K.1. raises the greatest issue of consistency of the proposed development:

K. RUNOFF POLICIES

1. Peak flood discharge rates of storm water flows in the major streams shall not exceed the peak rates of storm water runoff from the area in its natural or undeveloped state, unless it can be demonstrated that an increase in the discharge of no more than 10% of the natural peak rate will not significantly affect the natural erosion/beach sand replenishment process.

The applicant has interpreted this policy to mean that the peak rate of runoff shall not exceed the peak rates as measured from the discharge point at the existing PCH culverts or the discharge culverts of Los Trancos or Muddy creeks at the discharge points on the beach. This interpretation is demonstrated by Exhibit 20 in which the applicant calculates the pre- and post-development runoff rates at each existing culvert at its discharge point at the PCH bluff or beach culverts. No attempt is made to control the peak storm water discharge rate to no more than 10% of the natural peak rate, through the use of detention basins, before the storm flows enter the major streams.

An interpretation of the above cited Runoff Policy K.1. that is consistent with the other Category "A" and "B" ESHA, Erosion and Sediment Policies would be to control the peak flood discharge rates of storm water being discharged into the major streams at the point of origin of the discharge instead of attempting to control the rate of runoff at the PCH bluff culverts or Los Trancos or Muddy creek discharge on the beach. Controlling storm runoff on-site within the development area or on tributary drainages would protect the integrity of the major creeks along their entire length and would be consistent with Sediment Policy J.4 of the LCP that requires that sediment movement in the natural channels not be significantly changed. Policy J.4. reads:

J. SEDIMENT POLICIES

4. Sediment movement in the natural channels shall not be significantly changed in order to maintain stable channel sections and to maintain the present level of beach sand replenishment.

Controlling storm water runoff by detaining it within the development area or on one of the minor tributaries before it discharges into the major streams is also consistent with the LCP Backbone Drainage Concept, Exhibit S which locates all proposed detention basins out of the major streams. (Exhibit 21). As indicated in Exhibit S, the detention basin that is now proposed in Muddy Canyon was located in the development area in the LCP. Additionally, Erosion Policy I.1. requires that erosion rates not be significantly increased due to development and reads:

I. EROSION POLICIES

1. Post-development erosion rates shall approximated the natural or existing rate before development.

The subject coastal development permit application requests fill in the Category "A" ESHA stream course in PA 12C for the construction of a detention basin to control storm water runoff from the proposed development areas and the runoff from PA 3A, 3B and 14 approved by the County of Orange and natural areas. The detention basin would straddle the Planning Area boundary of PA 12C and PA 17. PA 17 is within Crystal Cove State Park and not within the LCP boundary. The portion of the detention basin that is within the State Park is located within a portion of Muddy Canyon that is designated as Category "B". The slope of the detention basin would also support a proposed road, Street "B", to serve the proposed private recreation center in PA 12C. This fill is inconsistent with the LCP which affords the highest protection to Category "A"

and “B” ESHAs. The detention basin will also result in wetlands fill as discussed below.

Erosion Policy I.1. requires that development not increase erosion in the natural streams. Sediment Policy J.4 also requires protection of the natural streams and the beaches. The applicant is increasing post-development erosion rates in Muddy Canyon by diverting storm water runoff from the development in PA 3A, 3B, and 14, by redirecting natural watershed drainage patterns through grading in the proposed development areas and with the use of storm drains (Exhibits 21 and 22). Because the LCP would not allow an increase in peak runoff rates by more than 10% the applicant is proposing to peak reduce the runoff with the construction of a detention basin in Muddy Canyon within existing wetlands and a Category “A” and “B” ESHA. The redirection of runoff from PA 3A, 3B, and 14 serve the purpose of eliminating the existing erosion problems along the PCH bluffs (Exhibit 23). However, the proposed project would redirect all of the runoff that currently discharges naturally to the PCH bluff culverts depositing sediment along with storm water onto the beach (exhibit 24).

Natural runoff and erosion plays a key role in beach nourishment by providing a source of beach sand. The LCP recognizes this role and therefore requires that post-development erosion rates approximate the natural or existing rate before development. Development also reduces the amount of sediment that flows naturally down the streams and across the bluffs and nourish the beaches. Loss of natural erosion and sediment can cause the beach to become narrow and thereby impact public access to the public Crystal Cove State Beach and Historic District. Also a significant change in the location of sediment deposition due to the redirection of runoff can adversely effect beach nourishment processes. This would be inconsistent with the Sediment and Erosion policies of the LCP. The applicant has not conducted a sediment transport and budget analysis to determine how the watershed will be affected. The applicant has however estimated that sediment loss. The total sediment loss for the development area will be 14%. The applicant believes that this is not a significant loss. The applicant also obtained an opinion from Dr. Jenkins of the Scripps Institute regarding the loss of sediment and potential impacts to beach nourishment. Dr. Jenkins concurred with the applicant that the overall impacts to beach nourishment are insignificant. This opinion was based on the concept that the beaches of Crystal Cove are not fed by the sediment of the streams and natural runoff from the bluffs. Instead the beaches are fed by littoral drift. The Commission however notes that the proposed diversion of runoff from the PCH bluff culverts will result in 80% and 97% reduction in the amount of pre- and post-development sediment in two specific locations along the beach. This almost total loss of sediment may be locally significant along the beach. The Department of Parks and Recreation (DPR) in its December 9, 1999 letter expressed concerns about the potential impacts on beach

replenishment that may be caused by the detention basin (Exhibit 16D). The Commission notes that the detention basin straddles the property line between the Irvine Company recreational site and the public Crystal Cove State Park. The spillway and rip rap for the detention basin are located on State Parks property. As noted earlier, the Commission's staff civil engineer has not had a chance to review these estimates and the conclusions made.

At this point, the Commission can not find that the proposed development which includes the significant loss of sediment through both the level of development and the redirection of natural runoff to Muddy Canyon, is consistent with the above Sediment, Runoff and Erosion Policies of the LCP. The coastal permit is therefore denied.

Further impacts to Muddy Creek may occur due to the increase runoff and detention basin located in Muddy Canyon. The detention basin could cause the sections of the creek below the facility to scour and destabilize due to the loss of sediment. This concern is not only expressed by the DPR in the above cited letter but is also expressed by EPA in its December 15, 1999 letter (Exhibit 28). The applicant prepared an "Erodability" discussion paper regarding the issue of potential destabilization of the creek due to the increased runoff from the development and the detention basin in Muddy Canyon (Exhibit 29). The erodability analysis concluded that there would be no significant adverse impacts to the stream due to increased runoff or the detention basin. However, the Commission notes that the findings were based on factually incorrect information regarding the wetland/riparian enhancement proposal and the storm drain discharge points. The Commission also notes that DPR still has concerns after consideration of the erodability analysis done by the applicant (Exhibit 30).

Therefore, the Commission finds that the proposed project is not consistent with the Sediment, Erosion, Runoff Policies of the LCP. The proposed development is also inconsistent with the public access provisions of the Coastal Act due to its potential impacts on local beach nourishment.

E. WATER QUALITY TREATMENT PROGRAM

The applicant is now proposing a water quality treatment program in this de novo application. It was not included in the project approved by the County. Concerning the water quality treatment program, the applicant states, "although not specifically addressed in the LCP, recent interest in water quality measures and other matters expressed by the Commission and others have prompted the addition of these

environmental enhancements.” The applicant also contends that the Commission may lack any legal ability to impose a comprehensive mitigation program for water quality.

The Commission strongly disagrees with this statement. The Coastal Commission does have and has carried out for years its authority to address coastal water pollution associated with land use practices and constituting non-point sources of pollution. The authority of the Commission with regards to the enforcement of the non-point source pollution control provisions of the Coastal Zone Management Act was discussed by the Commission’s chief counsel and deputy chief counsel in a memorandum dated October 21, 1999. The proposed project requires a 404 permit from the Army Corps of Engineers for the fill of wetlands and non-wetland jurisdictional waters of the United States. As such, the applicant also must obtain federal consistency certification. The standard of review for federal consistency certification is whether the project is consistent with the California Coastal Management Program. The Program includes the Coastal Act and those local coastal programs that have been formally approved by the Office of Ocean and Coastal Resource Management (OCRM) for incorporation into the State’s program. This de novo application is considered an application for both a coastal development permit pursuant to the certified LCP as well as an application for federal consistency certification.

As detailed below, the program includes measures to treat and control urban runoff from the project area as well as retrofitting existing developed areas and areas outside of the permit area that are currently under construction pursuant to coastal permits approved by the County of Orange. This is achieved through street and parking lot vacuum sweeping, storm drain filtration devices, and the flow of runoff through created riparian and wetland mitigation areas within Muddy Creek, within one of the residential development areas and within the tributaries that feed into Muddy and Los Trancos canyons.

The Commission does not dispute the research that indicates the effectiveness of the vacuum street sweeping and DrainPacs in removing specific contaminants before they get into the streams and ocean. Another highly beneficial aspect of the water quality enhancement program is the diversion of dry weather or “nuisance” flows from the proposed development areas and existing developed areas to the sewage treatment plant instead of discharging these flows into the ocean. The applicant has received a letter from the Orange County Sanitation District stating their intent to request approval of this diversion from the Board (See Exhibit 31). However, the water quality effectiveness of the riparian/wetland enhancement mitigation areas can not be quantified. Therefore the overall effectiveness of the proposal can not be determined. It has been designed to serve the dual purpose of water quality enhancement and mitigation for the loss of 0.12 acres of wetlands due to the proposed detention basin and the loss of 37,000 linear feet of jurisdictional waters of the United States for purposes of the Army Corps of Engineers 404 permit. The Commission as well as EPA and others continue to have concerns as to whether the riparian corridor proposed in PA 5 will be able to

function as planned due to its steepness, its design as a series of vegetated rip rap pools, and uncertain quantity of water to sustain the riparian vegetation. The proposed terraced pools of the riparian corridor mitigation area may become silted up, the plants wiped out under storm conditions or the vegetation not establish due to inadequate water supply. One of the BMPs proposed in the water quality enhancement program is to reduce irrigation. This may be contradictory to the needs of the riparian corridor plantings. Further, the applicant contends that sediment will not accumulate in the mitigation areas and therefore do not need to be cleaned out and that any riparian/wetlands plantings that are wiped out after the five year establishment period will come back on their own due to a mature root system.

The applicant's water quality enhancement plan is detailed in Exhibit 5, the Master Drainage and Water Quality Program as revised on December 10, 1999. Specifically, the program includes:

- Diversion of the majority of runoff from PA 4A, 5, 6 from Los Trancos Canyon to Muddy Canyon;
- The replacement of approximately 1,000 lineal feet of storm drain in the Category D ESHA in PA 5 with a "Riparian Extension", a system of vegetated pools and drops carrying urban runoff from the residential development of PA 5 and 6;
- The establishment of a riparian area for cleansing purposes at the southeasterly extremity of PA 5 to cleanse runoff that is not possible to convey to the agricultural detention reservoir;
- An additional approximately 750 ft. long natural riparian enhancement area located between the above riparian extension and the agricultural reservoir wetland area;
- Routing of runoff from PA 5 and 6 to a naturally occurring cleansing wetland formerly used as an agricultural reservoir;
- Expansion of an existing wetland with high quality wetlands for habitat and runoff cleansing purposes;
- Establishment of wetlands within the proposed detention basin and expansion of existing wetlands in Muddy Canyon in PA12C to slow and further cleanse the runoff before entering lower Muddy Canyon and the ocean;
- Installation of runoff interceptors at each of the five outlets from residential areas and in the commercial center (PA 14) to collect and cleanse runoff before it enters the stream course system;

- In the commercial center site (PA 14) along PCH which is currently under construction, direct parking lot runoff to a vegetated swale in the setback for additional filtration, install a filtering system in each catch basin to capture trash, hydrocarbons and heavy metals, vacuum street sweep the parking lot six days a week and install a clarifier in the service station if a service station is built;
- In PA 12C recreation site collect washrack water from the proposed stable and swimming pool and convey to the sewer system;
- On going work with Irvine Ranch Water District on programs to reduce irrigation runoff through state of the art computerized central radio-controlled irrigation systems for common areas; and
- Install a wet well and pump system just above PCH on Crystal Cove State Park property to intercept non-storm flows (dry season or “nuisance” flows) and convey them to the Orange County Sanitation District sewage treatment plant between April 15 and October 15 of each year from the planning areas subject to this permit as well as the residential areas PA 3A and 3B, 14, as well as the developed areas to the north and west containing 509 residential units and a portion of the golf course. Nuisance flows from the Los Trancos public beach parking lot will also be diverted to the sewage treatment plant.

As stated in Project Description section of this report, the applicant states that the Commission may not have the legal ability to require comprehensive water quality mitigation measures. The Commission disagrees with this statement. The applicant also states that the LCP does not contain “water quality” policies. The LCP designates the off-shore coastal waters ESHA Category “C” due to its diverse marine life and kelp beds and recognizes its designation as a Marine Life Refuge by DFG and an Area of Special Biological Significance by the Water Resources Control Board. The ESHA “C” policies state:

The protection of water quality in marine resource areas is subject to the authority of the State Water Resources Control Board”. Protection of water quality is provided by the LCP Runoff Policies and will be reviewed by the Regional Water Quality Control Board in conjunction with subsequent coastal development permits and related environmental impact reports (EIR’s).

A water quality monitoring program shall be submitted to the Regional Water Quality Control Board prior to initial implementing approvals for the golf course, for the purpose of monitoring runoff entering the ocean as well as the riparian corridors. Copies of the results of the monitoring program shall be forwarded to the Regional Water Quality Control Board and the County of Orange on a regular

basis for their review to determine whether corrective action is required pursuant to the authority of said agencies.

Use and application of chemicals on the golf course and other landscape areas shall be limited to those approved by State, County, and Federal agencies. The landowner shall be responsible for notifying tenants and/or prospective initial purchasers of this requirement.

The LCP contains Erosion Policies, Sediment Policies, Grading Policies as well as Runoff Policies. Although the above ESHA policy states that the LCP Runoff policies provides for the protection of water quality, the Erosion, Sediment and Grading Policies are also clearly aimed at protecting the streams and coastal waters from adverse impacts that can degrade them, inconsistent with their ESHA status. Suspended sediments constitute the largest mass of pollutant loading to receiving waters from urban areas. None of the Erosion, Sediment, Runoff or Grading policies of the LCP specifically address other forms of pollution such as nutrients, oxygen-demanding substances, heavy metals, hydrocarbons or pathogenic bacteria which are also a major problem in urban areas. Although the LCP does not specifically mention these other forms of pollution, they often enter surface waters via runoff which contains sediment and irrigation and storm water.

The above LCP policies do not specify standards for other components of non-point source water pollutants but refers to the authority of the Water Resources Control Board. On September 30, 1999 the Water Resources Control Board granted the proposed project a waiver of (See Exhibit 32). The waiver was granted by the Board without the additional water quality improvements now being offered. However protection of water quality in coastal and marine waters is also, by virtue of the Coastal Act, subject to the authority of the Coastal Commission. This position was reiterated in the October 21, 1999 memorandum by Commission staff legal counsel. If an LCP's provisions are not adequate and can not be used as the standard of review to determine if the above water quality enhancement program is adequate. Instead the Commission will review the efficiency of the program in protecting, and where feasible, enhancing the marine resources of the LCP area, specifically the off-shore Marine Life Refuge/Area of Special Biological Significance. Additionally, the water quality enhancement program must be consistent with all other provisions of the certified LCP.

The applicant is proposing to vacuum sweep the residential areas of the project area once a week. Also the residential streets of PA 3A and 3B which are not included in the project area will be swept weekly. The streets and 85-space parking lot recreation PA 12C will also be vacuum swept once a week. PA 14 will be developed with commercial uses and has a large, several hundred space, parking lot. The applicant proposes to vacuum sweep the commercial area daily, except for Sundays and holidays. According to information submitted by the applicant the use regenerative vacuum street sweeping is high effective in removing up to 93% of dry weight of the soil and certain pollutants (Exhibit 5).

Additionally, the applicant is proposing to install "DrainPac" storm drain filters in all major outflow points into Muddy and Los Trancos canyons and in 30 catch basins in PA 4A and 4B. They will also be placed in PA 3A, 3B and 14. The multi-layer filtration insert has been tested and proven to maximize filtration of sediment and associated bacteria and sludges containing heavy metals and petroleum hydrocarbons. The DrainPacs system will intercept potential urban pollutants not removed through street and parking lot vacuum sweeping, further protecting receiving waters from degradation. The applicant contends that with the combination of frequent vacuum street sweeping and parking lot sweeping and the installation of the runoff entering the streams will be basically "clean". The applicant also proposes a vegetated swale to be located in the recreation center parking lot area (PA 12 C) and the commercial parking lot area (PA 14) to provide additional filtering of any sediments before the flows are moved off the site towards the ocean or Muddy creek.

The proposed water quality treatment program also includes additional natural and created drainages features incorporating riparian/wetland mitigation areas, storm water detention basins, and energy dissipators within a 12,000 foot long system. The riparian/wetland enhancements along with the natural creek control the flow of the runoff to minimize erosion and scour but also provides for additional filtering of potential contaminants that are not caught through sweeping and filtering (see Exhibit 3). Although the efficiency of proposed wetlands/riparian areas to filter contaminants from urban runoff, the California Coastal Commission's draft Plan for Controlling Polluted Runoff (Mitigation Measure 6) promotes the use of vegetated strips or wetland areas to remove contaminant through filtration, deposition, infiltration, absorption, adsorption, decomposition and volatilization.

The natural and created features include the proposed "riparian corridor" in PA 5 which is a series of vegetated rip rap terraced structures designed to reduce storm water velocities and create natural sediment traps such as pools and eddies (see Exhibit 3.) This "riparian corridor" is designed to obtain water to sustain the riparian vegetation through irrigation runoff of the adjacent residences. Portions of Muddy Creek and the tributary streams will be planted with riparian vegetation below PA 5. After the runoff travels down the creek some of it passes through an existing agricultural pond. The flows from the pond then joins with flows from the riparian enhancement and natural flows from the open space areas as it travels Muddy Canyon until it reaches wetlands expansion area and then the proposed detention basin with additional wetlands and adjacent riparian enhancement areas. The detention basin is designed to allow low flows to pass while detaining higher flows which will benefit from the cleansing effects of the wetlands vegetation.

As stated the efficiency of the riparian/wetlands areas in filtering contaminants is unknown. However the applicant contends that the proposed water quality enhancement program is "state of the art" and provides water quality improvements required of no

other project and provides quantifiable standards for removal of sediments and masses of dissolved pollutants such as metals and phosphorus. Therefore the runoff will be relatively “clean” before it enters the creek and riparian/wetland cleansing areas. Additionally, if the Sanitation District agrees to accept the dry season runoff generated by the proposed and existing development, the Marine Life Refuge/Area of Special Biological Significance will be protected from significant degradation from non-point source pollution from April 15 to October 15 of each year. The Orange County Sanitation District has made it perfectly clear that they will not accept storm flows, even if they occur between April 15 to October 15 (Exhibit 31). Therefore the Commission must be assured that runoff from the proposed project site is consistent with the water quality aspects of the Runoff Policies of the certified LCP and protects the LCP designated Category “C” ESHA of the off-shore coastal waters. The water quality proposal must also be consistent with all other applicable LCP policies including the protection of other Category ESHA policies.

The Commission can only approve development inconsistent with any of the provisions of the certified LCP if the proposed project provides elements that promote other specific Coastal Act policies and on balance is more protective of the environmentally sensitive resources and public access. Although the wetland/riparian proposal provides many positive benefits that are arguably above and beyond what would be required by the LCP, it does not off-set the fill of wetlands, mitigate the adverse impacts to the Category “A” and “B” ESHA that would be caused by the detention basin, it does not provide assurance that the stream below the detention basin will not destabilize the stream, and that the beach will not be at least locally adversely affected by the almost total elimination of sediment as certain locations in the post-development condition due to redirection of runoff to Muddy Canyon.

F. WETLANDS

1. Fill Inconsistent With the LCP

The construction of the proposed Muddy Canyon detention basin in its currently proposed location also will result in the fill of 0.12 acres of wetlands. Additionally, Planning Area 4A also contains approx. 0.05 acres in three small, isolated wetland areas. According to the applicant the three small wetland areas were created by ranchers in order to provide water for the cattle that were grazed on the property in the past. The wetlands are referred to as the agricultural pond wetlands.

The proposed project would result in the fill of 0.05 acres of isolated wetlands in PA 4A for the purpose of residential development. The purpose of the detention basin is to regulate storm water runoff from both proposed and approved developed areas and natural areas. There is also a road proposed

on the top of the berm of the detention basin. The purpose of the road is to provide residents of the future homes in PA 4A and 4B access to the private recreation facility in PA 12C.

The applicant contends that the scattered wetlands in PA 4A are exempt from the Commission's appeal jurisdiction under Section 13577(b)(2) of the Commission's regulation. Section 13577(b)(2) provides that wetlands subject to the Commission's appeal jurisdiction do not include:

“...wetland habitat created by the presence of and associated with agricultural ponds and reservoirs where the pond or reservoir was in fact constructed by a farmer or rancher for agricultural purposes; and there is no evidence [...] showing that wetland habitat predated the existence of the pond or reservoir. Areas with drained hydric soils that are no longer capable of supporting hydrophytes shall not be considered wetlands.”

In support of their contention, the applicants have submitted statement by those familiar with the agricultural operations and documenting that the wetlands did not predate their agricultural operations. However, the applicant's evidence also documents that the agricultural operations ceased in 1995. Despite the cessation of the agricultural operations, the wetlands remain viable. The Commission finds that the exemption provided in 13577(b)(2) does not apply to wetlands that currently exist independent of and disassociated from preexisting agricultural activities. The Commission also notes that the wetland fill in PA 4A would support residential, not agricultural activities.

The proposed wetland fill for both the detention basin and the residential development is inconsistent with the certified LCP. As explained above, the LCP defines wetlands as an environmentally sensitive habitat area (ESHA) even though they were not designated on the ESHA Map, Exhibit H. However, the LCP does not contain specific policies authorizing development within the wetlands. It is possible that the LCP omits wetland specific policies because the wetlands at issue in the current did not exist at the time the LCP was certified. There are riparian wetlands in the higher quality Category A and B portions of the natural streams. The LCP requires development to be setback from Category “A and ” B “ ESHA within the streams which would also protect the wetlands of these streams. Because there are no LCP policies specifically authorizing the fill of the wetlands, the Commission finds that the fill of wetlands is inconsistent with the certified LCP. .

As stated earlier, although the wetland/riparian proposal provides many positive benefits that are arguably above and beyond what would be required by the LCP, it does not offset the fill of wetlands, mitigate the adverse impacts to the Category “A” and “B” ESHA that would be caused by the detention basin, it does not provide assurance that

the stream below the detention basin will not destabilize the stream, and that the beach will not be at least locally adversely affected by the almost total elimination of sediment as certain locations in the post-development condition due to redirection of runoff to Muddy Canyon.

G. DEVELOPMENT INCONSISTENT WITH THE BOLSA CHICA DECISION

Once an LCP is certified, its provisions, to the extent that it contains provisions on a particular subject, and the public access and recreation policies of the Coastal Act, constitute the standards of coastal development permit review. There are exceptions. When new material circumstances have changed warranting an expanded standard of review (e.g. on-the-ground features change, new listing under the Endangered Species Act, binding legal principles resulting from court rulings (Nollan, Lucas, Bolsa Chica), new knowledge or a scientific nature)

The Appellate Court decision in *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493 involved the Coastal Commission's approval of a local coastal program amendment for the Bolsa Chica segment of the County of Orange LCP that authorized development within wetlands and environmentally sensitive habitat areas. The Court of Appeal held that the Commission acted improperly in approving residential development and the expansion of a road in parts of the proposed development site that included an environmentally sensitive habitat area and wetlands. The Commission finds that the County's LCP must be interpreted in light of the *Bolsa Chica* decision due to its policies that allow the modification, including elimination of natural streams and associated riparian areas which are designated as ESHAs. Further, the LCP must be interpreted in light of the Bolsa Chica decision given the existence of the newly discovered "agricultural pond" wetlands and the omission of LCP policies that specifically govern permissible wetland fill. The project before the Commission is an appeal of a permit approved by the County of Orange. The County has interpreted its policies to allow residential development within wetlands, an environmentally sensitive habitat area, and the County's interpretation is not supported by findings which explain the basis for such fill.

The Commission finds that the project on appeal can not be approved because it is inconsistent with the certified LCP policies dealing with the protection of Category "A" and "B" ESHAs, ESHA designated wetlands, and the natural streams and beach from loss of sediment and increased runoff causing destabilization of the stream. The Commission can not find that the inconsistencies with the LCP are on balance more protective of water quality and the permit is therefore denied.

Estoppel and Justifiable Reliance

The applicants contend that the Commission should approved the proposed development based on principles of estoppel and justifiable reliance. Specifically, the applicants contend that (1) the LCP specifically authorized a balance of development and preservation which represents a final decision with respect to the application of Coastal Act policies to the subject appeal; (2) the public benefits extended by Irvine in reliance on the LCP is an implied promise that approval of private development would not be withheld; (3) the County's approval of the development agreement constitutes an express promise that Newport Coast would not be subjected to new rules and interpretations.

The Commission rejects the applicant's contentions. With regards to the applicant's first contention, the LCP does not represent a final decision on the ability of the applicant to undertake development within the Newport Coast. The LCP expressly acknowledges that a coastal development permit must first be obtained. Coastal development permit review is clearly an exercise of discretionary authority. Moreover, even if the LCP could constitute the final decision on the permissibility of development, as demonstrated above, the proposed project raises substantial issues of consistency with the certified LCP.

With regards to the applicant's second contention, the fact that the applicant has dedicated open space and created wetland habitat in other planning areas, even if voluntarily in advance of LCP requirements, does not guarantee that development will be approved in the Planning Areas at issue in the subject appeal. The LCP Dedication Program Requirements and Procedures preclude the acceptance of any offers to dedicate until after grading and building permits issue. In addition, the LCP only allows acceptance of proportional dedications if the landowner is not able to undertake development for 10 years. Therefore, given that the LCP provisions are contingent, the applicant can not justifiably rely on LCP provisions that expressly limit acceptance of dedications to advance the argument that approval of development would not be withheld.

Lastly, the existence of a development agreement between the County and the developer does not eliminate or alter the requirement that all development within the Newport Coast area must be consistent with the certified LCP. As demonstrated above, the proposed project raises issues of consistency with the certified LCP.

H. California Environmental Quality Act

Section 13096 of the California Code of Regulations requires Commission approval of coastal development permit application to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project does not demonstrate that it is the least environmentally damaging alternative development. The detention basin alternatives are all based on the proposed grading and subdivision design which could allow the detention basins to be located off of Category "A" and "B" ESHA streams, avoid destabilization of lower Muddy Creek and allow the existing deposition of sediment from the streams and culverts continue to nourish the beach. Therefore, the Commission denies the proposed project, as it is not the least environmentally damaging feasible alternative and is therefore not consistent with the requirements of the Coastal Act to conform to CEQA.